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No. 90-1056

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

CHARLES W. BURSON, Attorney General
and Reporter for the STATE OF TENNESSEE,
Petitioner,

vs.

REBECCA FREEMAN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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March 25, 1991

QUESTION PRESENTED

Does the First Amendment permit a state to prohibit the display and distribution of campaign materials and the solicitation of votes within 100 feet of the entrance to polling places, while permitting non-political messages to be communicated at those locations?

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STATEMENT OF THE CASE

This case involves a challenge to a Tennessee statute which expressly prohibits speech related to elections within 100 feet of the entrance to a polling place, while allowing all other kinds of speech within that area, including commercial speech and the solicitation of funds. Because the Tennessee Supreme Court correctly ruled that the statute created an impermissible content-based discrimination that violated the First Amendment, the petition should be denied.

This action was filed in the Chancery Court for the State of Tennessee at Nashville on July 27, 1987. Respondent

sought declaratory and injunctive relief against Tennessee Code Annotated § 2-7-111, which prohibits certain speech and conduct at polling places, and T.C.A. § 2-19-119, which fixes criminal penalties for violation of § 2-7-111, on the ground that they violate the First and Fourteenth Amendments to the United States Constitution and Article I, §§ 8 and 19 and Article XI, § 8 of the Constitution of the State of Tennessee. The offending portion of T.C.A. § 2-7-111, subsection (b), specifically applies only to "the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question . . .." Petition ("Pet.") at 6. No other speech is affected, nor is any other conduct, including the solicitation of funds for any non-political purposes, such as charitable, religious, or even commercial.

The prohibition applies within an area of "one hundred feet (100') from the entrances to the building in which the election is to be held..." subsection (a), Pet. at 5, and there is also a ban on "campaign posters, signs or other campaign literature . . . on or in any building or on the grounds of any building in which a polling place is located." Subsection (b), Pet. at 6. As a result, if an entrance is close to a street or sidewalk, the ban can extend well beyond the property lines of the polling places. On the other hand, if "the grounds" of the polling place are large, as they might be for a high school, the prohibition on displays can extend well beyond one hundred feet.[1]

Trial was held on October 24, 1988, before the Chancery

[1] In twelve of Tennessee's ninety-five counties, the boundary extends to three hundred feet. T.C.A. § 2-7-111(a), Pet. at 6. Petitioner Attorney General has opined that this distinction is unconstitutional according to Article XI, § 8 of the Tennessee Constitution. Addendum pp. 1a-5a.

Court, Twentieth Judicial District, Davidson County. Respondent, a longtime local political party activist, testified that personal solicitation and other polling place campaigning are especially important in district-specific political races. She testified that the 100-foot ban on personal solicitation and on the display and distribution of campaign materials has limited her ability to communicate with voters. Pet. App. 8a. Proof at trial also showed that in some instances the challenged 100-foot boundary extends onto sidewalks and streets adjacent to polling places.

The State failed to show that the display or distribution of campaign materials or the solicitation of votes near polling places has a different effect from the communication of other messages at polling places. *Id.* 14a. To the contrary, the State's witness, Davidson County Registrar, Constance Ann Alexander, testified that persons soliciting for charitable organizations inside the 100-foot boundary would pose the same kind of problem as persons soliciting votes inside that boundary. *Ibid.* The sole justification offered by the State for these restrictions was to prevent "interference with voting, confusion and overcrowding at the polling places and mistakes by election officials." Pet. App. 4a-5a.

In a Memorandum Opinion filed April 26, 1989, the Chancellor upheld the challenged statutes as a content-neutral time, place, and manner restriction. *Id.* 5a. Respondent then appealed as of right to the Supreme Court of Tennessee, which, by a vote of 4-1, reversed the trial court and declared the challenged statutes to be violative of the First Amendment, thereby making it unnecessary to decide the case under the Tennessee Constitution.

The opinion makes clear that its holding was based on the fact, admitted by the State, that "the statute on its face criminalizes only political speech and political activity. . .." Pet. App. 12a. It then rejected the claim that the statute was merely a reasonable time, place, and manner restriction, on

the theory that it is viewpoint neutral, even though content-based, distinguishing this case from the exclusionary zoning cases for businesses purveying sexual material, relied on by petitioner here and in the courts below. *Id.* at 12a-13a. The court also found that statute suppressed only certain speech and that the State failed to show that the prohibited speech "has a different effect from that of the communication of other messages at polling places." *Id.* at 14a.

Equally important to the court's decision was its rejection of the justification for the statute -- "the prevention of interference with voting, confusion, mistakes, and overcrowding at polling places" (*id.*) -- in light of its effect. It acknowledged that states have such an interest, finding it to be "compelling . . . *within the polling place itself.*" *Id.* at 15a, emphasis in original. But it found that T.C.A. § 2-7-111 was "not narrowly tailored to advance the State's interest" because of the lengthy 100 foot arc from all of the building's entrances and because the State's testimony "concerned the numbers of persons present in the polling place itself, not the numbers of persons outside the polls." *Id.* It also made clear that other, less restrictive statutes might well pass constitutional muster, citing one court's approval of 25 foot boundary, but observing that such "carefully drafted" provisions were not before the court. *Id.* at 18a.

REASONS FOR DENYING THE PETITION

1. The principal basis on which review is sought is that the decision of the Tennessee Supreme Court is inconsistent with the decisions of this Court in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), *Boos v. Barry*, 485 U.S. 312 (1988), *Ward v. Rock Against Racism*, 491 U.S. ___, 109 S.Ct. 2746 (1989), and *United States v. Kokinda*, ___ U.S. ___, 110 S.Ct. 3115 (1990). According to petitioner, those cases make clear that the determination that TCA § 2-7-111 is not content-neutral is in error. For the reasons set forth below, those decisions do not support the Attorney General's position.

To begin with, the statute invalidated by the Tennessee Supreme Court, like the District of Columbia regulation invalidated by this Court in *Boos v. Barry*, *supra*, directly burdens persons who communicate explicitly political messages, while speakers of other messages are left unaffected. Here, like *Boos*, "the government has determined that an entire category of speech . . . is not to be permitted." 485 U.S. at 319. Even a regulation that "'does not favor either side of a political controversy'" may be impermissibly content-based where it prohibits public discussion of an entire topic. *Id.*, *quoting Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 537 (1980). As the Tennessee Supreme Court correctly noted, T.C.A. § 2-7-111 "is content-based because it regulates a specific subject matter, the solicitation of votes and the display or distribution of campaign materials, and a certain category of speakers, campaign workers." Pet. App. 14a. Under T.C.A. §§ 2-7-111, a person who stands ninety feet from the entrance to a polling place exhorting people "Vote Republican" is subject to criminal prosecution, while another person standing the same distance from the entrance chanting "Hare Krishna" or a person in that location soliciting charitable donations is not; the sole distinction is the content of the message.

Petitioner attempts to justify this disparate treatment based upon the so-called "secondary effects" doctrine previously applied by this Court to uphold restrictive zoning of adult film outlets. Pet. at 9-11. *City of Renton v. Playtime Theatres, Inc.*, *supra*; *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). But *Young*, *Renton*, and their progeny make it clear that, in order for the secondary effects doctrine to apply, the government must show that the impact of these businesses on the surrounding area is different from that of businesses not dealing primarily in the subject materials.

Thus, the court of appeals in *Renton* found that the City Council made detailed legislative findings to this effect, *see*, *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527, 530-31, n.3 (9th Cir. 1984), as did the Detroit Common Council in *Young*, *supra*, 427 U.S. at 54-56, n.6 (plurality opinion), and *id.* at 81, n.4 (Powell, J., concurring).

In order for the secondary effects doctrine to apply, the government must show a factual basis sufficient to conclude that the restriction was enacted for the purpose of preventing urban blight. *Christy v. City of Ann Arbor*, 824 F.2d 489, 493 (6th Cir. 1987); *CLR Corp. v. Henline*, 702 F.2d 637, 639 (6th Cir. 1983). Thus here, the State would have had to show that the Tennessee legislators believed that engaging in political speech near the entrance to property to be used as a polling location two to four times in some years was likely to blight a neighborhood, increase crime, or devalue surrounding properties. But the Tennessee General Assembly enacted T.C.A. §§ 2-7-111 and 2-19-119 as part of an omnibus election bill (Tenn. Public Acts 1972, ch. 740), and there is no evidence that the General Assembly gave the slightest consideration to any "secondary effects" of soliciting votes near the entrance of a polling place, let alone that those effects were substantially different from those arising from the distribution of commercial handbills, religious tracts, or other printed materials which the law specifically allows.

Moreover, the proof adduced at trial belies any suggestion that the "secondary effects" doctrine applies here. Indeed, petitioner's only witness acknowledged that, if there were persons soliciting for charitable organizations inside the 100-foot boundary, they would pose the same kind of problems as persons soliciting votes inside that boundary. *See* Pet. App. 14a. That witness also suggested that the State's real concern with the solicitation of votes was *inside* the polling place which appears to be the direct opposite of the secondary effects relied on in *Renton*.

Petitioner places perhaps his greatest reliance on *United States v. Kokinda*, ___ U.S. ___, 110 S.Ct. 3115 (1990), where this Court upheld a federal regulation banning solicitation of funds on postal property, including a public sidewalk. He suggests that polling places and the surrounding streets and sidewalks are analogous to the sidewalk in *Kokinda*. Despite the fact that both bans include sidewalks, there are a number of important distinctions that make *Kokinda* plainly inapposite.

First, *Kokinda* involved the solicitation of money, which the Court concluded could have a serious disruptive effect on the flow of traffic into the post office. Here, by contrast, the ban applies to pure speech, and there is no claim by the State of *any* obstruction to traffic.

Second, the State of Tennessee does not own the polling place grounds, which in many cases are located on private property such as churches or private educational institutions. The State makes only limited, temporary use of such properties; other public or private activities are often conducted on the same properties at the same time as elections. By contrast, the federal government owned and controlled the post office properties at issue in *Kokinda*. *See* 110 S.Ct. at 3119. The Court there also noted that the post office had not dedicated its sidewalks to any expressive activity, *id.* at 3121, whereas polling places are by definition dedicated to expressive activity.

Furthermore, as the Tennessee Supreme Court noted, in some instances the 100-foot boundary extends onto sidewalks and streets adjacent to the polling places. Pet. App. 8a. Public streets and sidewalks are "traditional public fora that `time out of mind, have been used for purposes of assembly, communicating thoughts between citizens and discussing public questions.'" *Boos v. Barry*, *supra*, 485 U.S. at 318, *quoting Hague v. CIO*, 307 U.S. 496, 515 (1939). These fora "occupy a 'special position in terms of First Amendment

protection[.]'" *Id.*, *quoting United States v. Grace*, 461 U.S. 171, 180 (1983). For all of these reasons, petitioner's flawed analogy to the non-public sidewalk from the post office parking lot to the building in *Kokinda* does not support his argument here.

Finally, *Ward v. Rock Against Racism*, *supra*, offers no solace for petitioner either. There this Court upheld a regulation aimed at limiting the level of sound coming from concerts in Central Park, not because the city disapproved of the music, or preferred another kind, but because excessive volume of any kind disturbed those nearby. Not only is *Ward* inapplicable here because the goals of the two regulations are so different, but *Ward* dealt with conduct that dampens all speech, while T.C.A. § 2-7-111 applies only to political speech where "the importance of First Amendment protections is 'at its zenith.'" *Meyer v. Grant*, 486 U.S. 414, 425 (1988).

Even if the time, place, and manner test did apply, T.C.A. § 2-7-111 could not be upheld, as the court below made clear. An essential element of that test, curiously omitted from petitioner's recitation of it (Pet. at 8), is that the challenged regulation is "narrowly tailored to serve a significant government interest." *United States v. Grace*, *supra*, 461 U.S. at 177. The Tennessee Supreme Court correctly found that T.C.A. § 2-7-111 is not narrowly tailored to advance this interest:

> The statute at issue prohibits all campaign activity from an arc of 100 feet from *every* entrance to the polling places. In many instances this arc extends onto public streets and sidewalks. The State has not shown a compelling interest in the 100-foot radius. The specific testimony of the State's witness about confusion, error, overcrowding, etc. concerned the numbers of persons present in the polling place itself, not the numbers of persons outside the polls.

Pet. App. 15a (emphasis in original).

Since the *only* justification offered by the Attorney General for the 100-foot boundary around polling places is the prevention of interference with voting, confusion, mistakes, and overcrowding *inside* the polling places, it is obvious that the restrictions *outside* the polling place are hardly the kind of "narrowly tailored" rules required even under the time, place, and manner test.[2]

2. There is also no conflict among the lower courts for this Court to resolve. At least two United States Courts of Appeals have held that statutes limiting communications with voters at polling places violate the First Amendment. In *Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1988), the court invalidated a statute prohibiting exit polling within 300 feet of polling places on the ground that the statute was content-based and not narrowly tailored. Similarly, in *Clean-up '84 v. Heinrich*, 759 F.2d 1511 (11th Cir. 1985), the court invalidated as overbroad a Florida statute which prohibited the solicitation of any vote, opinion, contribution, or signature on a petition within 100 yards of a polling place on election day. *See also Firestone v. News-Press Publishing Co., Inc.*, 538 So.2d 457 (Fla. 1989) (statute prohibiting persons who are not in line to vote from coming within 50 feet of the polling place, upheld only insofar as it pertained to persons

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[2] In that regard we note that several Tennessee statutes address disruptive conduct at polling places without burdening political speech. T.C.A. § 2-19-101 prohibits interfering with a nominating meeting or election. T.C.A. § 2-19-103 prohibits preventing any person's performance of duties or exercise of rights under the election code. T.C.A. § 2-19-115 prohibits violence and intimidation to prevent voting. The Supreme Court of Tennessee opined that two of these statutes adequately prohibit voter interference and intimidation. Pet. App. 17a.

within a polling room, but set aside as to restrictions outside the polling place).

While petitioner points out that scores of states have statutes restricting election day activity, he cites no decision in which a prohibition of a particular message at a polling place has been upheld against a First Amendment attack. Moreover, the instant decision is confined to the borders of one State; it will not have the national impact predicted by the Attorney General, nor even that of a decision of a federal court of appeals. The existence of similar statutes in other States may some day yield a decision contrary to that of the Tennessee Supreme Court; however, all previous decisions known to counsel are in accord with respondent's position. Until a conflict in the decisions of State courts and United States Courts of Appeals occurs, review by this Court is premature. Indeed, the fact that every state has some type of regulation regarding activities in and outside of polling places on election day, Pet. at 15, makes the case for review here even less compelling: if petitioner is correct in his legal analysis, surely some court of appeals or state supreme court will agree. But, until one does, there is no basis for this Court to consider the issue.

3. Because respondent based her claim on both the U.S. and Tennessee Constitutions, a decision by this Court will not be the final word in this case. *Assuming arguendo* a reversal by this Court, the Supreme Court of Tennessee would then have to consider whether the challenged statutes violate Article I, § 19 of the Tennessee Constitution. There is a strong likelihood, based upon that court's interpretation of the Tennessee Constitution, that it would again rule in respondent's favor as a matter of state law.

The Supreme Court of Tennessee has previously opined that the provisions of Article I, § 19 assuring protection of free speech and press should be construed to have a scope at least as broad as that afforded those freedoms by the First Amend-

ment, and that that Court, as final arbiter of the interpretation of Article I, § 19, may expand the protection afforded a citizen's exercise of such liberties. *Leech v. American Booksellers Ass'n, Inc.*, 582 S.W.2d 738, 745 (Tenn. 1979). It follows that what the Supreme Court of Tennessee regards as violating the free speech and press guarantees of the federal First Amendment, it *a fortiori* regards as violating Article I, § 19 of the Tennessee Constitution.[3]

The Supreme Court of Tennessee has previously given short shrift to a municipal ordinance which made a constitutionally impermissible distinction between distribution of handbills bearing a commercial message and distribution of handbills bearing political or religious messages. *H & L Messengers, Inc. v. City of Brentwood*, 577 S.W.2d 444 (Tenn. 1979). The court specifically rejected an attempt to apply the time, place, and manner test there because the law distinguished between political messages and commercial messages. That difference rendered the ordinance impermissibly content-based, under both the First Amendment and Article I, § 19 of the Tennessee Constitution. *Id.* at 452-453. There

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[3] Article I, § 19 of the Tennessee Constitution provides:

> That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. But in prosecutions for the publication of papers investigating the official conduct of officers, or men in public capacity, the truth thereof may be given in evidence; and in all indictments for libel, the jury shall have a right to determine the law and the facts, under the direction of the court as in other criminal cases.

is no reason to believe that that court would reach a contrary conclusion as to the electoral statutes here which it has already found to violate the First Amendment. Therefore, review by this Court would likely result in an advisory opinion, with no practical significance.

CONCLUSION

Because petitioner has failed to show any basis for this Court to review the well-reasoned decision of the Supreme Court of Tennessee, the petition should be denied.

Respectfully submitted,
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ADDENDUM

State of Tennessee

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DECEMBER 3, 1987

OPINION NO. 87-185

The Three Hundred Foot (300') Election Boundary

QUESTION

Does Chapter No. 362 of the Public Acts of 1987 violate the Tennessee Constitution?

OPINION

Absent a rational basis for the provision being applicable only to particular counties by reference to the federal census, it is the opinion of this office that Chapter 362 of the Public Acts of 1987 violates Article XI, §8 of the Tennessee Constitution.

ANALYSIS

T.C.A. § 2-7-111 pertains to the arrangement of, and restrictions at, polling places. It originally provided for a one hundred foot election boundary which was applicable state-wide. Section 1 of Chapter No. 361 of the Public Acts of 1987

amended T.C.A. § 2-7-111(a) by adding the following:

> Provided, however, in any county having a population of:
>
> | Not Less Than | Nor More Than |
> |---|---|
> | 13,600 | 13,610 |
> | 16,350 | 16,450 |
> | 24,590 | 24,600 |
> | 28,500 | 28,560 |
> | 41,800 | 41,900 |
> | 50,175 | 50,275 |
> | 54,375 | 54,475 |
> | 56,000 | 56,100 |
> | 67,500 | 67,600 |
> | 77,700 | 77,800 |
> | 85,725 | 85,825 |
>
> all according to the 1980 federal census or any subsequent federal census, the officer shall measure off three hundred feet (300') from the entrances to the building in which the election is to be held and place boundary signs at that distance.

Within this three hundred foot boundary "the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question are prohibited." T.C.A. § 2-7-11(b). A violation of the provisions of this section is a misdemeanor. *See* T.C.A. §2-19-119.

Counties with population within the specified population ranges are governed by the three hundred foot boundary provision. This provision is applicable to the following counties according to the 1980 federal census: Bradley, Blount, Carter, Greene, Loudon, McMinn, Monroe, Polk, Sumner, Unicoi, and Wilson. All other counties are governed by the one hundred foot election boundary.

Article XI, Section 8 of the Constitution of Tennessee states in part:

> The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; no to pass any law granting to any individual or individuals, rights, privileges, immunitie [immunities] or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law.

Article XI Section 8 does not prohibit classifications but only prohibits unreasonable and arbitrary classifications. *LaFever v. Ware*, 211 Tenn. 393, 365 S.W.2d 44 (1963).

In *Harwell v. Leech*, 672 S.W.2d 761, the Supreme Court of Tennessee, in considering whether a reasonable basis for a special classification existed, reiterated the following principles:

> It is not necessary that the reasons for the classification appear in the face of the legislation. If any possible reason can be conceived to justify the classification, it will be upheld and deemed reasonable. So long as the statute applies equally and consistently to all persons who are or may come into the like situation or circumstance, it is not objectionable as being based upon an unreasonable classification. There is no general rule by which to distinguish a

> reasonable from an unreasonable classification, the question being a practical one varying with the facts in each case. Where the reasonableness of the classification is fairly debatable the courts will uphold the classification. [citations omitted].

Id. at 763. Thus, a determination of whether the statutory classification bears a reasonable relation to the subject sought to be achieved is necessary before the classification will be upheld as reasonable.

A review of the legislative history reveals that Public Chapter No. 362 originated as House Bill No. 384 introduced on behalf of Bradley County. It appears that a measure which would extend the election boundary from one hundred feet (100') to three hundred feet (300') was put to a referendum vote by the citizens of Bradley County. The measure passed by 84%. When it was discovered that the election boundary could not be extended by referendum, House Bill No. 384 was introduced. No justification was given for the bill except that the voters in Bradley County passed an identical measure by 84%. The bill was subsequently amended to include other counties and after submission to a conference committee Public Chapter 362 achieved its present form.

Applying the principles of *Harwell* to this situation it appears that there is not a rational basis for this provision being applicable only to particular counties. There are no readily identifiable differences between the counties which come under Public Chapter 362 and the counties to which it does not apply which would justify the distinction. Nor is there any discernable reason why an extension of the boundary to three hundred feet is necessary in the affected counties. Consequently, the classification embodied in Public Chapter 362 is arbitrary and unreasonable. In light of these facts and the applicable principles, it is the opinion of this office that Public Chapter 362 violates Article XI, § 8 of the Tennessee

Constitution.

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